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MAX-PLANCK-INSTITUT
FÜR EUROPÄISCHE RECHTSGESCHICHTE

MAX PLANCK INSTITUTE
FOR EUROPEAN LEGAL HISTORY

www.rg.mpg.de

Max Planck Institute for European Legal History

research paper series

ISSN 2699-0903 • Frankfurt am Main

No. 2020-04 • http://ssrn.com/abstract=3551259

Stefan Vogenauer

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I. Introduction

Sources of law matter. They serve to separate the province of law from the realm of non-law. Only propositions that are derived from a valid source of law are genuinely *legal* propositions. Other commands and prohibitions, be they of a religious, moral, or other nature, may determine our daily lives to a much greater extent. Nevertheless, they are not legal commands and prohibitions, with all the consequences this entails for their use (or non-use) in the legal process and in other spheres of public discourse. Adultery, for instance, may be prohibited

by a statute or by a religious text. It may also be habitually sanctioned by the members of a particular social group. Your neighbour may find it offensive. Sociologists and political scientists may point to the fact that it has subversive and detrimental effects on families and on society as a whole. However, whether adultery is a legal issue depends upon whether we accord statutes, religious texts, group practices, your neighbour's personal opinions, or the views of social scientists the status of 'sources of law' or not.

Questions as to sources of law are inextricably linked with questions of legal method. Whether a source of law is successful in producing a particular result, indeed, whether it makes any impact at all, depends to a great extent on the way it is applied and interpreted. In a given legal system, the law does not simply consist of the raw legal sources. The law in force is the product of their refinement by the competent authorities applying and interpreting them. Law without interpretation, as Frederick Pollock said, 'is but a skeleton without life, and interpretation makes it a living body'.[1] Take, for example, the sentence: 'Congress shall make no law … abridging the freedom of speech'. This is most certainly a legal proposition since the United States Constitution and its amendments are regarded as sources of law in the United States. However, the actual content of the rights conferred and the duties imposed by the First Amendment depends on what the relevant interpretative authorities, ultimately the US Supreme Court, understand by, say, 'abridging', 'freedom', 'speech', or even 'Congress'.

The purpose of this chapter is to outline the role of sources of law and legal method in the study of comparative law. In Section II I will explain why these topics have been central to comparative legal scholarship from its very beginnings. In Section III I will attempt to clarify their ambit for the purposes of comparative study, and I will identify the pitfalls lurking for the comparative lawyer who wants to determine another system's sources of law and the methodological approach prevailing there. Section IV gives an overview of the most important comparative studies specifically dedicated to these matters, and in Section V I will map out some areas which merit further research.

II. The Significance of Sources of Law and Legal Method for the Discipline of Comparative Law

Comparative lawyers have always attached special importance to questions of legal sources and legal method. There are three reasons for this. First, these topics are highly significant for every comparative enquiry, whatever its subject-matter. Second, they are central to one of the most widely discussed structural or taxonomical theories of the discipline of comparative law, the theory of legal families. Third, they raise interesting methodological questions because it might be argued that sources and method are not only the object of comparative studies but that, conversely, comparative law in itself constitutes a source of law and an important

[1] Frederick Pollock, *A First Book of Jurisprudence* (1896), 226.

tool for legal methodology. Thus it can be said that sources of law and legal method are of interest to comparative lawyers on three different levels: in what may be termed 'applied comparative law', in the theory of comparative law, and in comparative methodology. In the following three subsections I will refer to each of these levels in turn.

1. Importance for the Practice of Comparative Law

It is impossible to conduct a comparative study without knowing which sources of law are acknowledged and which methodological approaches prevail in the various legal systems concerned.[2] Any enquiry into the solutions provided for a specific legal problem in different legal systems has to take account of the law in these systems, and 'the law', as it has been said above, is constituted by the legal sources as they are applied and interpreted in a given system. Thus it does not come as a surprise that the leading textbook in comparative law exhorts the comparatist to 'treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers there would treat as a source of law, and [to] accord to those sources the same relative weight and value as they do'.[3] And, it might be added, the comparatist has to apply and interpret these sources in the same way as the lawyers in his chosen system do in order to make sure that he gives them the same content and meaning which they are understood to have in that system. Of course all of this does not only hold true for comparative enquiries in the narrow sense, but also for the merely descriptive study of a foreign legal system without further comparison (*bloße Auslandsrechtskunde*).

By way of example, a particular fact pattern that is provided for by statutory default rules in the contract law of one system might be dealt with by trade usages in another system. A third and a fourth system might solve the problem by judicial implication of terms into the contract or by a 'supplementary interpretation' of the agreement. In a fifth system, finally, the issue might typically be dealt with by contractual standard terms. In order to assess the solutions provided for this fact pattern the comparatist does not only have to know whether statutory default rules, trade usages, judicial glosses of the content of contracts, or standard terms constitute a source of law in the respective system. He also has to explore their relationship to other sources of law and their status in the legal system seen as a whole. And, finally, he must be aware of the methodological approaches that are adopted in relation to statutes, trade usages, contracts, and contractual standard terms in the various legal orders.

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[2] A good example of the relevance of these issues to applied comparative law is provided by their extensive treatment in chapters 6 to 8 of Harold C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edn, 1949).

[3] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans Tony Weir, 3rd edn, 1998), 35 f. For an early elaboration of this argument, see Georges Cornil, 'La complexité des sources du droit comparé', in *Introduction à l'étude du droit comparé: Recueil d'Études en l'honneur d'Édouard Lambert* (vol I, 1938), 358, 367 f.

There is, of course, the possibility that, in one or other of the legal systems analysed, the fact pattern in question is provided for by mechanisms which these systems do not regard as genuinely legal. Comparative lawyers frequently observe that some societies are juridified to a different extent.[4] One might, for instance, imagine that the situation envisaged in the previous paragraph is not subjected to legal devices, but dealt with by a consumer ombudsman, an assembly of *boni viri* or *prud'hommes*, or the members of the local Chamber of Commerce who make decisions according to their discretion. Examples could be multiplied, and they could be drawn from most areas of law and society. A comparison of the positions of the chairpersons of national parliamentary assemblies of, say, the United Kingdom and Germany would reveal that the status of the President of the *Bundestag* is mostly perceived as a matter of constitutional law, whereas the position of the Speaker of the House of Commons is essentially thought of as a political office, so that the rights and duties of the officeholder are primarily defined and shaped by purely political considerations. However, findings of this sort do not necessarily entail that a comparative enquiry is impossible or irrelevant. The enquiry just changes its character and requires an examination of the relevant extra-legal context. And it provokes further questions, such as why the society in question does not see the need to deal with the fact pattern in legal terms, whether the relegation of the issue to the sphere of non-law is advantageous or not, and whether other legal systems might benefit from this approach.[5] In any event, the knowledge of the system's sources of law remains vital to the comparatist because, without it, he or she would not be able to assess the legal or non-legal character of the solution provided.

2. Importance for the Theory of Comparative Law

Sources of law and legal method are important to comparative lawyers for another reason: they are central building blocks of different theories of legal families. These theories divide the various legal systems of the world into larger groups with a view to organizing and classifying them in a rational way. Traditionally, the prevailing legal sources and the methods of reasoning from them were seen as a defining, if not *the* defining, criterion of classification. Early comparative research was mostly confined to Western legal systems and the divide between the 'common law' world and the 'civilian' systems. The crucial difference perceived by comparatists was that the legal orders in the former group were mostly based on judge-made law that was applied according to an elaborate doctrine of precedent, whereas the systems in the latter group were essentially based on codes and other statutes which were interpreted

[4] See eg John Bell, 'English Law and French Law – Not so Different?', (1995) 48 *Current Legal Problems* II, 63, 90 ff.

[5] See Otto Kahn-Freund, 'Comparative Law as an Academic Subject', (1966) 82 *LQR* 40, 55 f.

in a relatively broad and liberal fashion.[6] These issues figure prominently in theories of legal families to this day.[7]

Their importance was somewhat downplayed by the theory of legal families that dominated the second half of the twentieth century, that is, that of Konrad Zweigert and Hein Kötz. However, even these authors included 'the kind of legal sources a legal system acknowledges and the way it handles them' in the list of five factors the interaction of which was said to constitute the 'style' of that system. This 'style', in turn, was seen as the decisive criterion for allocating a given system to a particular legal family.[8] In addition, at least two of the other four stylistic factors advanced by Zweigert and Kötz cannot be applied without reference to sources of law and legal method, namely the 'distinctive mode of legal thinking' and the system's 'historical development'.[9] The former, as explained by Zweigert and Kötz, depends to a large extent on whether the system is based on case law or on codes and on the ways lawyers reason from these sources. The latter cannot possibly be traced without looking at the sources and the methodological approaches prevailing at different stages of this development. This becomes particularly obvious once it is acknowledged that sources of law and the approach to legal method do not exist in a vacuum, but are the product of human beings, and, frequently, of groups of persons exerting a dominant influence in a given legal system. These can be, for instance, judges, legislators, scholars, mandarins, or a caste of high priests. If the focus is shifted to these principal actors in a legal system who shape the system's general character or 'climate' and who can be called either '*honoratiores* of the law', 'legal notables',[10] or 'oracles of the law',[11] then a legal system's decision to acknowledge various sources of law and a hierarchy between them can be perceived as the result of power struggles between groups of persons, each representing certain political and social ambitions.[12] When comparative lawyers talk about 'sources of law', and about that other key concept of 'legal notables', they simply highlight opposite sides of the same coin.

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[6] See eg Henri Lévy-Ullmann, 'Observations générales sur les communications relatives au droit privé dans les pays étrangers', in Société de législation comparée (ed), *Les transformations du droit dans les principaux pays depuis cinquante ans (1869–1919): Livre du cinquantenaire de la Société de législation comparée* (vol I, 1922), 81 ff. Proposed as one of two defining criteria by René David, *Traité élémentaire de droit civil comparée: Introduction à l'étude des droits étrangers et à la méthode comparative* (1950), 223 ff.

[7] See eg Peter de Cruz, *Comparative Law in a Changing World* (4th edn, 2015), 40; Raymond Legeais, *Les grands systèmes de droit contemporains: une approche comparative* (3rd edn, 2016), 64–71, 88; Mathias Siems, *Comparative Law* (2014), 44–58.

[8] Zweigert and Kötz (n 3), 71.

[9] For these two criteria see Zweigert and Kötz (n 3), 68–70.

[10] Following Max Weber, cf Edward Shils and Max Rheinstein (trans), *Max Weber on Law in Economy and Society* (1954), 52, 199–223.

[11] Following John P. Dawson, *The Oracles of the Law* (1968), who takes up an expression used for the judges by William Blackstone, *Commentaries on the Laws of England* (vol I, 1765), 69.

[12] Raoul C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (1987), 67–9, 84–6, 108–9. See also the contributions in Jürgen Basedow, Holger Fleischer, and Reinhard Zimmermann (eds), *Legislators, Judges, and Professors* (2016).

For the theory of comparative law, questions of legal sources and legal method are thus of the utmost significance. It does not matter, incidentally, whether a particular theory of comparative law is built on the notion of 'legal families' or, as has become fashionable more recently, on the conception of 'legal traditions' or 'legal cultures'. Every attempt to separate, say, one 'legal tradition' from the other has to give prominent weight to the sources of law and legal methods prevailing in the respective traditions.[13]

3. Comparative Law as a Source of Law and as a Tool of Legal Method

Finally, there is a peculiar twist to the relationship between legal sources and legal method on the one hand and the discipline of comparative law on the other. It is not only that the latter takes the former as an object of its study. Quite the reverse, it can be argued that comparative law as such, or, more precisely, the results of comparative enquiries constitute a source of law and a tool for legal method. This is a question that is traditionally dealt with under the rubric of 'functions of comparative law' and that is thus raised and discussed in much more detail in other chapters of this book.[14] However, the issue should at least be flagged in the context of this chapter.

There are, broadly speaking, two conceivable aims of comparative law. One possibility is to see the accumulation of comparative knowledge as an end in itself without further need of justification.[15] Alternatively, comparative studies can be regarded as a means to another end, and a number of functions of comparative law are conventionally enumerated for this purpose.[16] Some of these, one might even argue the most important of these, are directly concerned with the creation, application, and interpretation of law. Thus it is widely acknowledged that comparative law can be a valuable aid in drafting and also – despite some recent sceptical *dicta* on the part of some Justices of the United States Supreme Court and a number of somewhat ill-informed statements in ensuing debates in Congress[17] – in interpreting both national and supra-national legislation. It can also serve as a tool for courts creating and refining case law. Thus, the person making or applying a legal provision may take into account the solutions other legal systems provide for a given problem, and comparative law may, therefore, be said to be a 'source of law' in a wider sense. Subsequently, both the substantive law

[13] See eg John Henry Merryman, *The Civil Law Tradition* (2nd edn, 1985), chs IV–X; Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, 2014), 61–5, 93–7, 172–6 and in other passages introducing particular legal traditions.

[14] See particularly Chapters 18–21 above.

[15] See eg Rodolfo Sacco and Piercarlo Rossi, *Introduzione al diritto comparato* (6th edn, 2015), ch 1, § 1.

[16] For an authoritative account, see Zweigert and Kötz (n 3), 13–31. For comparative studies of the role of comparative law in the courts, see Ulrich Drobnig and Sjef van Erp (eds), *The Use of Comparative Law by Courts* (1999) and Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds), *Comparative Law before the Courts* (2004).

[17] For a useful summary of the issues raised in *Lawrence v Texas* 539 US 558 (2003) and *Roper v Simmons* 543 US 551 (2005), see Ruth Bader Ginsburg, '"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication', (2005) 64 *Cambridge LJ* 575 ff.

that is enacted on this basis and the methodological approach, which (a) has been followed in doing so and (b) is followed in the application and the interpretation of the law, can in turn be subjected to further comparative enquiries.

While most lawyers would probably be prepared to accept the role of comparative law in the process of creating and elaborating the law as described in the previous paragraph, they would almost certainly be reluctant to accord to comparative law the status of a 'source of law'. The reason for this is, as will be seen in the next Section of this chapter, that the phrase 'source of law' is frequently understood to include the notions of bindingness and authoritativeness. Now it is undoubtedly true that the persons making and applying the law in a domestic context usually do not regard themselves bound by the results of comparative enquiries. They rather seek to 'derive *support*' for one or the other conclusion 'from what has been done in other legal systems' and want to know what a 'cross-check with these systems *suggests*'.[18]

In the increasingly important supra-national context, however, the normative force of comparative law is much stronger. Article 288(2) of the Treaty Establishing the European Community explicitly provides that the non-contractual liability of Community organs is to be determined 'in accordance with the general principles common to the laws of the Member States', and the European Court of Justice has affirmed that, 'in the absence of written rules' on a given issue, it is prepared to draw 'inspiration' from such general principles 'in other areas of Community law' as well.[19] It has particularly done so in developing a set of fundamental rights of Community law on the basis of 'the indications provided by the constitutional rules and practices of the … Member States',[20] an approach that was codified in Article 6(2) of the 1992 Treaty on European Union. Obviously, the 'general principles common to the laws of the Member States' can only be traced by comparing the solutions of domestic legal systems. This also applies in the case of the International Criminal Court which, according to Article 21(1)(c) of its 1998 Statute, has to apply the 'general principles of law derived by the Court from national laws of legal systems of the world'.[21] The provision is modelled on Article 38(1)(c) of the 1945 Statute of the International Court of Justice which directs the Court to apply 'the general principles of law recognized by civilized nations'. It is widely accepted that these principles belong to the sources of international law,[22] and

[18] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 [156] and [168], [2003] 1 AC 32 at 113, 118 *per* Lord Rodger (emphasis added). Cf s 39(1)(c) of the 1996 South African Constitution: 'When interpreting the Bill of Rights, a court … may consider foreign law'.

[19] Case C–46 and 48/93 *Brasserie du Pêcheur SA v Germany* [1996] ECR I–1029 [41].

[20] Case 44/79 *Hauer v Land Rheinland Pfalz* [1979] ECR 3727 [20]; see already Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 [4] and Case 4/73 *Nold KG v Commission* [1974] ECR 491 [13]: '… to draw inspiration from constitutional traditions common to the Member States'. Neither of the decisions explicitly refers to Art 288(2) of the Treaty.

[21] Rome Treaty of 17 July 1998, establishing the International Criminal Court. See, in the criminal law context as well, the reference to 'the general principles of law recognised by civilised nations' in Art 7(2) of the 1950 European Convention for the Protection of Human Rights and Freedoms.

[22] See eg Restatement 3d of the Foreign Relations Law of the United States, § 102(1)(c).

the Court has frequently drawn on them to develop rules of fair procedure and substantive concepts, such as estoppel or the prohibition of abuse of rights. Comparative law can thus legitimately be said to be a 'source' of international law.[23]

III. Establishing the Sources of Law and the Legal Method of another System

So far in this chapter the concepts 'source of law' and 'legal method' have been used as if their meaning were clear. In fact this is symptomatic of the way lawyers tend to use these terms: lawyers surely know a source when they see it, don't they? However, the issue is not entirely straightforward, as has already been seen in the previous two paragraphs, when the question whether comparative law constitutes a 'source of law' was discussed. It might therefore be helpful to define the two key concepts of this chapter more closely and enquire how a comparative lawyer can actually determine another legal system's sources and the methodological approaches prevailing there.[24]

1. Sources of Law

(a) Terminology

Law does not just happen. Every rule of law has an origin. It can be said to 'flow', 'emerge', or 'descend' from this 'source'. Such metaphors were already used in ancient Rome, by lawyers and non-lawyers alike.[25] The expression *fons iuris* was coined in medieval Latin from where it found its way into the major Western languages ('sources of law', '*sources du droit*', '*Rechtsquellen*', '*fonti del diritto*', '*fuentes del derecho*', '*rechtsbronnen*', '*retskilde*'). However, the commonly shared metaphor conceals an extremely varied use of the term in different legal systems. Frequently it is not even employed consistently within one and the same system. Different definitions can be found in different areas of law, and similar phenomena are given different names by different authors. Thus 'formal sources' are distinguished from 'factual', 'material', or 'substantial' ones, 'legal' ones from 'historical' ones, 'binding' or 'authoritative'

[23] L. C. Green, 'Comparative Law as a "Source" of International Law', (1967) 42 *Tulane LR* 52 ff.

[24] The most comprehensive and systematic treatment of the issues raised in this Section can be found in Léontin-Jean Constantinesco, *Rechtsvergleichung*, vol II: *Die rechtsvergleichende Methode* (1972), nos. 40–69; a French translation is available under the title *Traité de droit comparé*, vol II: *La méthode comparative* (1974).

[25] Pomponius, D. 1, 2, 2, 6: '… lege duodecim tabularum ex his fluere coepit ius civile'; Papinian, D. 1, 1, 7 pr.: 'Ius autem civile est quod ex legibus, plebis scitis, senatus consultis, decretis principium, auctoritate prudentium venit'; Cicero, *De legibus*, 1.5.16: 'fons legum et iuris'. Cf also Livius, *Ab urbe condita*, 3.34.6 who describes the Twelve Tables as the 'fons omnis publici privatique … iuris'.

ones from 'persuasive' ones, 'written' ones from 'unwritten' ones, 'mandatory' ones from 'permissive' ones, 'sources of validity' from 'sources of knowledge', and so on.

Part of the terminological difficulty stems from the fact that the notion 'source of law' is used to designate related, but ultimately different objects. First, it is sometimes employed to refer to the institutions and groups of persons which create law, for instance 'the legislature', 'the judiciary', 'the courts', or 'legal scholars'. Second, the metaphor is frequently used to denote various forms of conduct which these institutions or persons engage in and which are generally accepted in a legal system as validly generating law, such as the enactment of a statutory provision by the competent legislative authority in conformity with certain formal requirements, a long-standing and generally approved practice, or the formulation of a legal rule by the competent judge. Thus 'the passing of legislation', 'customary behaviour', or 'rendering a judicial decision' are said to be 'sources of law'. Third, the expression 'source of law' is referred to in order to designate the wide variety of factors influencing these institutions and persons when they are creating law in one of the ways just mentioned: a particular fragment in the Digest, for instance, can be seen as the 'source' of a passage in a treatise of Pothier's which, in turn, can be called a 'source' of a rule in the French Civil Code; Aristotle's ideas might pass off as a 'source' of the legal principle that like cases are to be treated alike; the comparative observation that the doctrine of privity of contract had been abandoned in the United States and New Zealand and was out of step with the laws of most European countries was, together with many other factors, at the origin and thus a 'source' of the English Contracts (Rights of Third Parties) Act 1999 which abrogated the doctrine. Fourth, the term is widely used to designate the body of law resulting from one of the forms of conduct that are generally accepted as validly generating law. It is in this sense that lawyers speak of 'statute law', 'customary law', 'case law', or 'professorial law' as 'sources of law'. Fifth, the phrase is employed to refer to the instruments or documents from which lawyers obtain their knowledge of such law and which provide evidence for its existence, such as collections of statutory materials, case reports, records of customs, or legal treatises.

The terminological confusion is increased by the fact that, in some languages and legal systems, similar words are used to denote different objects that can be regarded as sources of law. The English expression 'legislation' is a good example. It designates both the action of giving laws and the resulting body of enacted laws. At least up to the late seventeenth century, it was also employed to refer to the legislative body that passed statutes. In the Romance languages the term '*la doctrine*' or '*la dottrina*' refers to the body of persons producing legal literature, the products of their writing, and the body of printed material that may be consulted to ascertain these products alike.

The most important terminological issue with respect to legal sources is that of bindingness. In some legal systems the predominant view is that one can only speak of a 'source of law' if the persons framing legal solutions to given fact patterns are under an obligation to take the relevant item into account. From this perspective, a precedent, an Act of Parliament, or a Constitution can only be regarded as a 'source of law' if, say, a police officer is under a duty not to disregard a precedent in point, a judge deciding a case is bound to attend to a

relevant statutory provision, or the legislature is obliged to respect the pertinent constitutional norms. The binding, authoritative, or mandatory character thus becomes an integral part of the definition of the term 'source of law' itself. In other legal systems a greater readiness to adopt a broader understanding of the term prevails, and it is widely acknowledged that factors which do not *have to*, but *may be* taken into account when framing a legal solution constitute legal sources as well. Judges in such a system, who find that no source of law in the narrower, 'binding' sense just mentioned determines the case before them, might base their decision directly on a passage from the Digest[26] or from a treatise of Pothier.[27] The proponents of the broader view are, as will be easily seen, those who embrace, *inter alia*, the third possible use of the term 'sources of law', whereas those adhering to the narrower approach reject it. The narrower perspective typically prevails in legal systems which are dominated by a positivist concept of law. The wider view is characteristically endorsed in legal systems with a strong natural law or other non-positivist tradition.

The difference of opinion as to the bindingness of legal sources is but one example of the fact that different legal systems and even different actors within one and the same system adopt diverging views as to what constitutes a 'source of law'. If the comparative lawyer analysing another system is required, as has been said above, to treat as a source of law 'whatever the lawyers there would treat as a source of law', he or she cannot neglect any of these views. 'For the purposes of comparative studies', as Konrad Zweigert wrote almost half a century ago, 'a legal source is everything that shapes or helps to shape the law'.[28] As a consequence, comparative lawyers have to understand the term 'sources of law' in its broadest conceivable meaning. As has just been shown, the phrase 'source of law' is used to give an answer to five different questions relating to the creation or production of law: (1) Who creates law?; (2) How is it created?; (3) Which factors are taken into account in doing so?; (4) What are the products of the lawmaking process?; (5) From which documents can they be ascertained? The comparatist is thus concerned with the creators of law, the modes in which law is made, the factors taken into account in the lawmaking process, the body of law emerging from this exercise, and the documents providing evidence for the existence of this body of law.

[26] Cf famously, *Acton v Blundell* (1843) 12 M & W 324 at 353 *per* Tindal CJ, holding that the authority of Marcellus 'appears decisive': 'The Roman Law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries of Europe'.

[27] See eg *Smith v Wheatcroft* (1878) 9 Ch 223 at 229–30 *per* Fry J.

[28] Konrad Zweigert, 'Zur Methode der Rechtsvergleichung', (1960) 13 *Studium Generale* 193, 196: 'Rechtsquelle im Sinne rechtsvergleichender Forschung ist alles, was das Rechtsleben … gestaltet oder mitgestaltet'.

(b) Legislation on Sources, Theories of Sources, and Social Reality

How then does the comparative lawyer find out what the sources of law in another legal system are? In some systems the range of sources is determined by legislation. The classic example is that of Roman law where the sixth-century emperor Justinian, in his *Corpus Iuris Civilis*, enacted a catalogue of sources, stating that 'our law is written and unwritten'. The unwritten law comprised usage and custom, whereas 'the written part consists of enactments of the assemblies of the people, enactments of the plebeian council, resolutions of the senate, determinations of the emperor, edicts of the magistrates, and the opinions of the learned'. These sources were then defined in more detail.[29] Similar catalogues were frequently included in nineteenth- and twentieth-century civil codes which assumed quasi-constitutional status. Article 1(1) of the Spanish Civil Code of 1889, for instance, states that the 'sources of the Spanish legal order are statute law, custom and the general principles of law'. The Italian Civil Code of 1942, in Article 1 of the 'Provisions on the Law in General' which precede its main body, accords '(1) statutes; (2) regulations; (3) corporative norms; (4) usage' the status of sources of law.[30] Similar provisions can be found in the introductory chapters of the civil codes of Louisiana, California, Switzerland, and Greece.[31]

Some civil codes also determine a hierarchy of the acknowledged sources. A hierarchy can be established between different kinds of sources in the sense that the source that is lower in the hierarchy must not contradict the higher source. The Italian Civil Code can again serve as an example. It states that regulations 'cannot contain rules contrary to the provisions of statutes', that in 'matters regulated by statutes and regulations usage has effect only to the extent indicated by them', and that corporative norms 'prevail over usage'.[32] The well-known first article of the Swiss Civil Code of 1907 obliges the judge to decide, in the absence of an applicable statutory provision, 'according to customary law, and in the absence of a custom, according to the rules which he would establish if he were called on to act as a legislator', deriving, in the last-mentioned case, inspiration from 'approved legal doctrine and judicial tradition'. Some codes also establish a hierarchy with respect to sources of the same kind. Article 2(2) of the Spanish Civil Code, for instance, disposes that, in the case of conflict between two statutory provisions, the more recently enacted or more special rule takes precedence over the more ancient or more general provision.

More recently, catalogues of legal sources have been increasingly contained in constitutional documents. Article 11 of the Constitution of the Republic of Ghana of 1992, to

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[29] Inst. 1, 2, 3–9.

[30] As to corporative norms, please see the text below on page 889.

[31] Art 1 of the Louisiana Civil Code of 1870 as revised in 1987 (legislation and custom); ss 22.1 and 22.2 of the California Civil Code of 1872 (Constitution, statutes, and common law); Art 1 of the Swiss Civil Code of 1907 (statute law, custom, approved legal doctrine, and judicial tradition); Art 1 of the Greek Civil Code of 1940 (statutes and custom). See also Art 1 of the 1980 Israeli Statute on Foundations of Law (statute law, case law, analogy, and 'principles of freedom, justice, equity and peace of Israel's heritage').

[32] Arts 4(1) and 8 of the 'Provisions on the Law in General'. See also Art 1(2)–(7) of the Spanish Civil Code.

take but one example, provides that the 'laws of Ghana shall comprise (a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law'. In a supra-national context, catalogues of sources of law can be found in the Statutes of international courts.[33] Other legislative texts are less comprehensive and single out just one or a few sources that are regarded as particularly important or as radically breaking with the past. Thus, Article 55 of the French Constitution of 1958 declares that, in principle, international treaties and agreements 'prevail over Acts of Parliament'. Article 2(2) of the 2005 Constitution of the Republic of Iraq highlights that 'Islam is the official religion of the State and it is a fundamental source of legislation'. According to Article 8 of the 1950 Civil Code of the Philippines, '[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system'. The 1919 Mexican statute on the 'amparo', the most important action in the Supreme Court which includes, *inter alia*, a procedural mechanism similar to the French *cassation*, established the binding nature for inferior courts of *jurisprudencia* laid down by five consonant decisions of the Supreme Court.[34]

Other legislators do not positively enumerate the legal sources they acknowledge. They rather single out, *ex negativo*, certain forms of conduct that are not supposed to generate law. Article 5 of the French Civil Code of 1804 famously prohibits judges to enunciate decisions by way of general and regulative disposition in the cases which come before them, and thereby denies the existence of judgemade law. The Austrian Civil Code of 1811 contains a similar provision in its § 12 and, in addition, its § 10 denies all customs the status of sources of law as long as they are not explicitly endorsed by legislation. The Prussian *Allgemeines Landrecht* of 1794, in § 6 of its Introduction, ordered that the 'opinions of legal writers or previous decisions of the courts will be ignored in future decision-making'. Article 265 of the 'supplementary provisions' annexed to the 1865 Italian Code of Civil Procedure also prohibited the courts from 'invoking the authority of legal writers'. More recently, in the United States much debate has arisen with respect to various Circuit Rules and other court rules which provided and still provide that unpublished judicial decisions 'are not precedent', 'not binding precedent', or 'must not be cited or relied on' in court.[35]

Most of the legislation pertaining to sources of law remains fragmentary, and many legal systems do not contain any legislative provisions of this kind at all. More importantly, it

[33] Art 38 of the 1945 Statute of the International Court of Justice (international conventions, international custom, general principles of law, judicial decisions, teachings of publicists, equity). See also Art 21 of the 1998 Statute of the International Criminal Court.

[34] See now Arts 222–4 of the *Ley de Amparo*, as published on 2 April 2013.

[35] See eg 2017 California Rules of Court, Rule 8.1115(a). The constitutionality of such rules (which may be regarded as 'legislation' in the wider and substantive sense given to the term in Section IV.2.(a) of this chapter) was discussed in *Anastasoff v United States*, 223 F3d 898 (8th Circuit 2000) and in *Hart v Massanari*, 266 F3d 1155 (9th Circuit 2001). A much more permissive attitude was introduced by the 2007 Federal Appellate Rules of Procedure, Rule 32.1.

might be argued that the legislator cannot possibly determine the sources of law in a comprehensive fashion because this would presuppose that legislation itself, be it in the guise of a civil code or of a constitutional document, is a source of law. For all these reasons, in most systems the task of developing a comprehensive and coherent set of answers to questions on sources is assumed by theories of legal sources. These are elaborated by legal scholars. There are different kinds of theories produced by different groups of writers. One group of theories is of a universalist nature. Such theories are advanced by jurisprudential writers who are primarily concerned with the nature of the rules which ultimately determine whether a certain form of conduct qualifies as validly generating law and whether a certain body of rules and principles qualifies as 'law'. These writers are mostly occupied with finding a solution to the problem just mentioned, namely, that neither legislation nor any other source of law can validly generate its own legal validity. They maintain, for instance, that every legal system contains a certain basic rule ('*Grundnorm*') from which the validity of all other legal rules can be derived[36] or that it comprises one or more specific 'rules of recognition' which enable lawyers to identify what the law is.[37] For the comparative lawyer's work these jurisprudential theories are usually only of limited assistance since they are, precisely because of their claim to be of universal applicability, detached from the sources of law actually acknowledged in a given legal system and do not tell him or her the actual content of that system's *Grundnorm* or rule of recognition.

Other theoretical writings are meant to apply only to a specific legal system. Some of them are of a purely normative nature. They advance views as to who *ought* to create law, which forms of conduct *ought* to qualify as validly generating law, or which factors *ought* to be taken into account in this process. Others are purely descriptive. They are usually found in the works of doctrinal writers of the respective jurisdiction. General texts of the 'Introduction to the legal system' type, or textbooks on specific areas of law, normally contain a short account of the sources that *are* in fact accepted in that particular system or area of law. Again, an early example can be found in Roman law. The 'Institutes' of Gaius, an overview of the law of the second century BC, begins with an account of what the law of the Roman people consists of.[38] It is essentially the same catalogue that was later codified in the *Corpus Iuris*. More sophisticated theories of legal sources were developed from the Middle Ages onwards. Their importance increased as new bodies of law, such as Canon law or territorial statutes, emerged alongside Roman law and a need for the harmonization and ranking of the different sources arose. Similar catalogues and rankings have been established ever since and can be found in introductory texts all over the world up to this day.[39] However, on closer inspec-

36 Hans Kelsen, *General Theory of Law and State* (1945), 110–24, 131–4.

37 H. L. A. Hart, *The Concept of Law* (1961), 97–120.

38 Gai. 1, 1–7. Cf Inst. 1, 2, 3–9, Papinian, D. 1, 1, 7 pr. (nn 29, 25, above).

39 See eg John Bell, 'Sources of Law', in Andrew Burrows (ed), *English Private Law* (3rd edn, 2013), 3 ff; Ludwig Enneccerus and Hans Carl Nipperdey, *Allgemeiner Teil des bürgerlichen Rechts* (vol I/1, 14th edn, 1952), 240 ff, 311 ff; François Terré, *Introduction générale au droit* (10th edn, 2015), nos. 147 ff, 360 ff. The classic common law account can be found in Blackstone (n 11), 63–92.

tion most of the writings on sources in a given system turn out to be a rather curious mixture of normative and descriptive elements. On the one hand, normative theories frequently refer to the attitudes to sources that are prevailing in the system. On the other hand, the descriptive accounts often combine the author's perception of what is generally accepted as a legal source with his or her views as to what ought to be regarded as a source of law. This mixture is responsible for the fact that, in many legal systems, rather different accounts of the system's sources are set forth. Still, most legal systems have a prevailing theory of sources that is widely shared in the legal community.

The comparative lawyer who looks at another legal system has to be suspicious of both the legislation and the prevailing theories on legal sources which he or she encounters. Legal systems, as John Henry Merryman once wrote, operate

> in an atmosphere of assumptions which, although demonstrably unsound, tend stubbornly to persist because they are firmly rooted in the culture. This kind of folklore serves a variety of functions, some laudable and others regrettable. Although it exists in most exaggerated form in the lay mind, it tends, somewhat refined, to dominate the thinking of the profession itself. Alternately idealized and caricatured, it becomes the starting point of much scholarly discussion.

The folklore has a certain grasp on legal thought because participants in the legal system tend, 'through operation of the principle of self justifying expectations, to conform to the folkloric model'. However, this model does not represent an accurate picture of the legal process, and there remains a 'tension between folklore and practice'.[40]

These observations are particularly apt in the context of legal sources. There is a difference between how people talk and think generally about the law and how they go about it. The orthodoxy on sources, as conveyed by legislation and theoretical writings, does not necessarily reflect the social reality in the respective legal system, but rather the ideology as to the propriety of lawmaking that was predominant at the time the legislation was enacted or the theory was developed. But often there are conflicting views in the legal community which cannot be entirely suppressed. The Italian legislator's attempt to exclude scholarly writings from the range of legal sources, for instance, was widely ignored by the courts of the day. For decades the French *Conseil d'Etat* famously disregarded Article 55 of the Constitution of the Fifth Republic and did not accept the precedence of what was then European Community law over subsequent domestic legislation. Furthermore, the conventions accepted within the legal system and, ultimately, in society at large as to what counts as a source of law can change over time. Such changes can be brought about abruptly and as a deliberate break with the past. The enactment of the prohibition on judicial lawmaking in the French Civil Code is an example of a revolutionary repudiation of the approach that had previously prevailed. The 'corporative norms' mentioned among the legal sources at the outset of the Italian Civil Code of 1942 were relegated to insignificance almost instantly by subsequent legislation. They had been the brainchild of Italian fascism and its corporative system: generally applicable rules produced by a variety of bodies and affecting the organization and operation of the economy.

[40] John Henry Merrymann, 'The Italian Style III: Interpretation', (1966) 18 *Stanford LR* 583, 585 f, 589, 591.

With the downfall of fascism in 1944 the corporate system was abolished, and since then no further corporate norms have been issued. Today, the reference to these norms remains in the Civil Code, but it only applies to a few collective labour agreements adopted prior to 1944. Similarly sudden changes of direction which were not even initiated by legislation could be witnessed in 1966 when the House of Lords discarded the firmly established convention that it was bound by its own earlier decisions, and in 1989 when the *Conseil d'Etat*, in an equally spectacular U-turn, accepted the supremacy of Community law.

More frequently, however, changes in a legal system's attitude towards sources of law come about slowly. Thus, the French prohibition on judicial lawmaking has become increasingly contested from the late nineteenth century onwards. Today, most French lawyers are, in spite of Article 5 *Code civil*, prepared to accord decisive weight to court decisions. Similarly, case law is of the utmost importance in the German legal system, which lacks a statutory regime of sources, but where the prevailing theory, deeply steeped in nineteenth-century legal thinking, only acknowledges legislation and custom as sources of law. The Austrian views on custom have significantly changed since 1811 when an exclusion of this body of rules from the range of legal sources seemed vital for political reasons. Because of such evolutionary changes in the general attitude to lawmaking in a legal system, legislative enactments and theories on legal sources are frequently out of step with reality.

As a result, comparative lawyers, in their attempt to ascertain what 'the law' of another system actually is, cannot rely on official or semi-official statements and doctrines of sources. They must, to speak with Merryman once more, look beyond the 'folklore' and develop a certain sensitivity as to what is regarded as a source of law and as to how various sources are perceived to be ranked in the other system. In most legal systems, a closer look will show that the conventions as to the determination of the sources of law are far from settled. In reality 'the law' or, indeed, any specific legal rule will be constituted by a blend of various factors. The solution to a fact pattern will emerge from the interplay of statutory texts, judicial glosses, and suggestions in, maybe even contradictory, academic writings. This observation led one of the leading comparatists of the twentieth century, Rodolfo Sacco, to draw an analogy with phonetics: just as a full tone is made up by the entirety of various characteristic sounds, the so-called 'formants', so a full legal rule is constituted by different 'legal formants'.[41] Domestic lawyers learn to discern the different strength of the various formants, that is, the difference in weight that is accorded to the respective sources, by years of training and experience. To acquire this ability while lacking the same background is one of the greatest challenges the comparative lawyer faces when he or she encounters another system.

[41] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', (1993) 39 *AJCL* 1 ff and 343 ff.

2. Legal Method

(a) Terminology

'Method', in its original Greek meaning (μέθοδος), connotes the 'path' or 'way to achieve an end'. In post-classical Latin the term 'methodus' was already used to denote a mode of proceeding, and at least from the sixteenth century onwards the French 'méthode' described a rational way of doing things, a particular mode of proceeding according to a defined and regular plan in an intellectual discipline or field of study. In the same sense the expression subsequently found its way into all the major European languages. In a legal context, the term 'method' is usually employed to refer to the 'path' or the 'way' from an existing source of law to the decision on a particular legal issue in a given situation. Understood in this sense, it concerns the application and the interpretation of the law and is a synonym for the expression 'legal reasoning' that is more frequently used in common law systems.

Today it is widely accepted that the application and interpretation of law is, at least in some instances, a creative process that generates new law. As a consequence, the legal method of a legal system necessarily affects the creation of law in that system. It is for this reason that, as has already been said in the introduction to this chapter, considerations of sources of law are inextricably linked with questions of legal method. This becomes even more obvious if, as is frequently done, legal method is not confined to the modes of legal reasoning, but is understood to include the 'ways' of lawmaking in a general sense. Legal method, understood in this broader sense, is also concerned with the creation of law from scratch and the procedures followed in doing so. It comprises, for instance, the legislative techniques or the style of drafting judicial decisions. An important part of a legal method therefore gives an answer to the second of the questions generally associated with the concept of sources of law, namely 'How is the law created?' As opposed to the theory of sources of law, it does not only identify the various forms of conduct which are generally accepted as validly generating law, such as the enactment of a statute by the competent legislative authority in conformity with certain formal requirements. It adds information as to how these forms of conduct are pursued.

In sum, and taking into account the role of methodological issues in both the creation and the application and interpretation of the law, it can be said that a legal method typically answers the following questions: (1) What is the style of lawmaking?; (2) Who applies and interprets the law?; (3) Which factors are taken into account in the application and interpretation of the law?; (4) How are these factors ranked?

In the context of comparative studies, the notion of a 'legal method' is not unproblematic. It presupposes that there is a rational and methodological approach to lawmaking and legal reasoning. Undoubtedly there are primitive legal systems that have not developed such modes. Anglo-American lawyers sometimes speak of 'palm tree justice' when they feel that the decision in a particular case was methodologically flawed, thereby invoking the idea of a *cadi* leisurely sitting in the shade and dispensing justice as he pleases. It is certainly possible to envisage a society where disputes are resolved by, say, the casting of a dice or an observation

of how the crows fly. However, such a society would probably be studied by legal anthropologists or legal ethnologists rather than by comparative lawyers. The systems that are analysed in comparative studies usually operate on the basis of rational ways of lawmaking and legal reasoning, even if the views as to rationality may differ from one system to another.

(b) Legislation on Legal Method, Methodological Theories, and Practice

In some legal systems the legislator gives directions on legal method. Legislative pronouncements on the style of legislation are rare. The legislative organs of the European Union (formerly, the European Communities), for instance, formulated a number of guidelines for the quality of drafting of Community legislation in a series of inter-institutional agreements.[42] A legislative provision on judicial style can be found in section 313 of the German Code of Civil Procedure which enumerates certain aspects that have to be contained in judgments of the civil courts.

Examples of legislative enactments on the question as to who is entitled to apply or interpret the law are more frequent. Most of them belong to legal history. Once more, Justinian can be regarded as the ancestor of this tradition. He tried to monopolize the authority to interpret the *Corpus Iuris* by requiring judges to submit difficult cases to him.[43] Many other rulers from the Middle Ages up to the early nineteenth century followed suit. Religious legal systems commonly reserve the interpretive function to their spiritual leaders or high priests, as can still be seen in canon 16 of the Catholic *Codex Iuris Canonici* of 1983. An even more recent example of legislation on the power of interpretation is contained in the 1997 Hong Kong Basic Law. Its Article 158 provides that, in certain circumstances, this power shall be vested in the Standing Committee of the National People's Congress of the People's Republic of China. Usually, of course, in modern legal systems based on the separation of powers, the interpretative function is allocated to the judiciary. Thus, Article 220(1) of the Treaty Establishing the European Community stipulates that the Community courts 'shall ensure that in the interpretation and application of this Treaty the law is observed'. According to Article 90(2) and (3) of the Iraqi Constitution of 2005, the Federal Supreme Court of that country 'shall have jurisdiction over the … [i]nterpretation of the provisions of the constitution [and settle] matters that arise from the application of federal laws'.

Furthermore, many legal systems contain legislative provisions on the factors to be taken into account in interpreting the law and how to rank them. Some rules on the interpretation of legislation were contained in the *Corpus Iuris Civilis*. The *Corpus Iuris Canonici* of the Catholic Church added others, and the first Continental codifications of Bavaria, Prussia, and Austria contained more or less elaborate sets of interpretative guidelines.[44] The draftsmen of

[42] [1999] OJ C73/1, [2002] OJ C77/1, [2003] OJ C321/1.

[43] *Constitutio Tanta*, 21 = *Codex* 1, 17, 2, 21.

[44] See §§ 9–11 of chapter I 2 of the *Codex Maximilianeus Bavaricus civilis* of 1756, §§ 46–50 of the Introduction to the Prussian *Allgemeines Landrecht* of 1794, and §§ 6–9 of the Austrian Civil Code of 1811.

the French *Code civil* devised a similar set of rules for the *livre préliminaire* they suggested, but this part of the draft code was ultimately not enacted. This may be seen as a first example of legislatures recognizing that it is virtually impossible to develop a coherent statutory regime capable of embracing all the aspects of statutory interpretation. This view continues to prevail in civilian systems where today the task is seen to be one that has to be solved by the courts and legal scholars acting in cooperation. Consequently, the drafters of more recent civil codes, such as the ones of Germany, Switzerland, or the Netherlands, refrained from drawing up rules on this matter. However, some systems still contain provisions in point. Apart from Austria, this category comprises the likes of Chile, Louisiana, Italy, or Spain.[45] A fairly recent instance can be found in section 39(2) of the 1996 South African Constitution which provides that when 'interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Section 2 of the 2014 Civil Code of the Czech Republic requires that each private law provision must be interpreted in accordance with the Constitution, the principles underlying the Code, and 'the values that it protects'; the rule also establishes a hierarchy of these and other interpretative criteria.

In the common law world there are rules on statutory interpretation as well, but they are usually judge-made. Yet some common law systems have statutory provisions dealing with the interpretation of statutes. These 'Interpretation Acts' can be of two kinds. Some of them exclusively contain legal definitions of frequently used words and expressions, for instance the Irish Interpretation Act 1937 or the UK Interpretation Act 1978. Others also comprise general rules on interpretation, such as sections 4, 5, and 13 of the California Civil Code or the provision on the use of legislative materials in section 15AB of the Australian Acts Interpretation Act 1901, as amended in 1984, which is mirrored in the legislation of some of the Australian States. An attempt to codify some rules of this sort in the United Kingdom failed when the House of Commons rejected the Interpretation of Legislation Bill 1981.

Given the pointillist treatment of legal method by legislators, comprehensive and coherent accounts of the topic can only be found in scholarly writings on the topic. As is the case with respect to legal sources, there are both universalist theories which are not necessarily useful for the comparative lawyer and writings focusing on the legal method of a particular legal system, the latter group being divided into normative theories, descriptive studies, and a majority of works that blend normative and descriptive features. The comparatist, again as in the case of sources, has to be wary of the legislation and of theories containing a normative element. They represent the preferences of legislators and legal writers with respect to various approaches to legal reasoning and methods of lawmaking, and quite frequently these views have not been accepted in the legal community at large, or they have changed over

[45] Articles 19–24 of the Chilean Civil Code of 1855, Articles 9–13 of the Louisiana Civil Code of 1870 as revised in 1987, Articles 12 and 14 of the 'Provisions of the Law in General' of the Italian Civil Code of 1942, Articles 3–5 of the Spanish Civil Code of 1889, and Article 10(2) of the Spanish Constitution of 1978. For a recent overview, see Christiane Wendehorst, 'Methodennormen in kontinentaleuropäischen Kodifikationen' (2011) 75 *RabelsZ* 730 ff.

time. Section 4 of the California Civil Code, for instance, which stipulates that the Code's 'provisions are to be liberally construed with a view to effect its objects and to promote justice' can hardly be said to have made a profound impact on the practice of the Californian courts. The core message of § 6 of the Austrian Civil Code, that is, that statutes are not to be interpreted against their express words, has been assiduously ignored by the Austrian judiciary for a long time.

Even the more general or programmatic pronouncements on methodological issues made by the courts themselves cannot always be taken at face value. It is well known that there is a difference between 'saying' and 'doing' in that the courts frequently propagate rules of application and interpretation which conform to constitutional and political orthodoxy, but are disregarded if they lead to undesirable results. The famous doctrine of *acte clair* developed by the French Supreme Courts is a case in point. It contends that a need to interpret a statute only arises if the provision in question is 'unclear and ambiguous'. If this is not the case, the statute has to be applied strictly to the letter. Still, it is no secret that the courts are prepared to deviate from the seemingly clear wording of enactments if strong arguments militate in favour of another result. The Anglo-American counterpart of the doctrine of *acte clair*, the so-called 'literal' or 'plain meaning' rule, has suffered a similar fate throughout the common law world: although it has remained intact on the surface, the courts have been increasingly ready to discard it in order to achieve what they perceive to be more appropriate results. Similarly, the staunch English doctrine of *stare decisis* might demand that lower courts meticulously follow the precedents of higher courts, but again every English lawyer knows cases where this has not been done.

As a result, comparative lawyers who attempt to establish a foreign legal system's approach to methodological issues will find that the respective legislation and the prevailing theories and doctrinal writings only assist them up to a point. As with respect to ascertaining the legal sources, they will have to overcome the other system's 'folklore' and develop a certain awareness as to which kinds of argument and modes of legal reasoning are generally regarded as acceptable and feasible in that system. This can only be acquired by observing the interpretative practices of the persons and institutions engaged in the application and interpretation of the law, typically, but not exclusively, the courts of that system.

IV. Comparative Studies of Sources of Law and Legal Method

In Section II of this chapter it has been shown that sources of law and legal method are of central importance to the discipline of comparative law. Yet, as has been seen in Section III, these concepts are far from clear, and getting to grips with the sources and methods of another system is fraught with difficulties. Small wonder that a huge body of comparative literature has been dedicated to these topics. It is the purpose of this Section to give a, necessarily rather sketchy, survey of the relevant writings.

1. General Studies

Sources of law and legal method are treated extensively both in textbooks on comparative law[46] and in introductions to legal systems[47] or to legal families[48] aimed at foreign readers. However, only few publications have been exclusively devoted to a comprehensive treatment of these issues from a genuinely comparative perspective. In the early 1930s the International Academy of Comparative Law devoted a session to the problem of the 'diverse sources of law, their equilibrium and their hierarchy in the different legal systems'. The papers, some of them given by scholars of the calibre of Roscoe Pound and Giorgio Del Vecchio, were published in the Academy's Proceedings.[49] A monumental, five-volume study by Wolfgang Fikentscher was published in the 1970s.[50] Over the course of more than 2,500 pages of text the author, a distinguished German private lawyer and legal anthropologist, dealt extensively with sources and methodology both in a comparative and in a historical perspective. He considered early and religious laws, the Romanistic legal family, the common law, and the Germanic systems before going on to develop his own highly sophisticated theory of sources and methodology. Many chapters of this book have the character of free-standing articles, or even monographs, for instance a 180-page-long account of Rudolf von Jhering's legal theory, or a fifty-page overview of legal realism. While some passages of the book are now outdated, it remains a useful reference work on the subject-matter of this chapter.

A slightly less ambitious, but still comprehensive treatment is provided in the chapter on 'Sources of Law' in the International Encyclopedia of Comparative Law, published in 1981. Over more than 200 pages, the doyen of French comparative law, René David, dealt with both the sources and the way in which they are applied and interpreted in different legal

46 Some, but by no means all of them, are referred to in the first Section of this chapter.

47 See eg with special emphasis on sources and method, Ivy Williams, *The Sources of Law in the Swiss Civil Code* (1923); Henri Lévy-Ullmann, *The English Legal Tradition: Its Sources and History* (1935); René David, *French Law: Its Structure, Sources and Methodology* (1972); Dominique T. C. Wang, *Les sources du droit japonais* (1978); Eva Steiner, *French Legal Method* (2002), updated and expanded as *French Law: A Comparative Approach* (2nd edn, 2018).

48 See eg with special emphasis on sources and method, John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (1990); Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan Amal* (2nd edn, 2002); Robert Lingat, *Les sources du droit dans le système traditionnel de l'Inde* (1967). For the 'family' of mixed legal systems see Joseph Dainow (ed), *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (1974); Vernon Valentine Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001), 31 ff, 44 ff.

49 'Les diverses sources du droit, leur équilibre et leurs hierarchies dans les divers systèmes juridiques', in (1934) II/2 *Actorum Academiae universalis iurisprudentiae comparativae* (= Mémoires de l'Académie internationale de droit comparé), cf Roscoe Pound, 'Hierarchy of Sources and Forms in Different Systems of Law', (1933) 7 *Tulane LR* 475 ff. See, more recently, Edgar Reiners, *Die Normenhierarchie in den Mitgliedstaaten der europäischen Gemeinschaften* (1971).

50 Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, vol I: *Frühe und religiöse Rechte. Romanischer Rechtskreis* (1975), vol II: *Anglo-amerikanischer Rechtskreis* (1975), vol III: *Mitteleuropäischer Rechtskreis* (1976), vol IV: *Dogmatischer Teil* (1977), vol V: *Nachträge. Register* (1977).

systems.[51] The chapter's most important contribution is the strong emphasis on socialist law and non-Western legal traditions, with frequent references to Islamic law, Hindu law, and Jewish law. An important comparison of English and American law which comprised thorough examinations of sources of law and legal reasoning was published by Patrick Atiyah and Robert Summers in 1987.[52] Another monograph which focused on the sources in the common law world and in codified systems appeared in Italy in the early 1990s.[53]

As has already been seen throughout this chapter, questions of sources and method can hardly be understood without reference to the history of the legal system in question. For this purpose it is helpful to draw upon Jan Schröder's recent accounts on the theories of sources of law and legal method prevailing in Germany and, to some extent, in other Continental systems between 1500 and 1945.[54] A slightly older, but still magisterial equivalent for the common law tradition is Carleton Kemp Allen's *Law in the Making*.[55] In this context, two further studies have to be mentioned: both John Dawson's *Oracles of the Law* and Raoul van Caenegem's *Judges, Legislators and Professors* provide ample references to English, French, and German legal history.[56] They approach the topic by focusing on legal notables, which, as has been said before, changes the perspective, but not the field of enquiry.

2. Studies of Specific Legal Sources and the Methodological Approaches Pertaining to them

Apart from these general works, there is a multitude of studies focusing on specific legal sources and the methodological approaches pertaining to them. The following observations are not intended to give a comprehensive overview of the relevant literature, but rather to highlight the most important and influential writings. In order to limit the material, only genuinely comparative works will be mentioned, at the expense of neglecting studies on the sources and methods of a particular system which were written with an eye to a foreign readership, but do not specifically engage in comparison with another system.[57]

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[51] René David, 'Sources of Law', in *International Encyclopedia of Comparative Law* (vol II, ch 3, 1981).

[52] Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987).

[53] Lucio Pegoraro and Antonio Reposo, *Le fonti del diritto negli ordinamenti contemporanei* (1993). A shorter version was published by Lucio Pegoraro and Angelo Rinella, *Le fonti nel diritto comparato* (2000).

[54] Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)* (2012); id, *Rechtswissenschaft in Diktaturen: Die juristische Methodenlehre im NS-Staat und der DDR* (2016).

[55] Carleton Kemp Allen, *Law in the Making* (7th edn, 1964).

[56] Dawson (n 11); van Caenegem (n 12).

[57] Three prominent and influential examples would be Karl Nickerson Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika* (1933); Konrad Zweigert and Hans-Jürgen Puttfarken, 'Statutory Interpretation: Civilian Style', (1970) 44 *Tulane LR* 704 ff, and the trio of articles by John Henry Merrymann on 'The Italian Style I: Doctrine', 'The Italian Style II: Law', and 'The Italian Style III: Interpretation' in (1965–6) 18 *Stanford LR* 39 ff, 396 ff, 583 ff. See also some of the works cited in nn 46–8 and Marc Ancel, 'Case Law in France', (1934) 16 *Journal of Comparative Legislation* 1 ff; L. Neville Brown, 'The Sources of Spanish Civil Law', (1956) 5 *ICLQ* 364 ff; Yvon Loussouarn, 'The Relative Importance of Legislation,

(a) Legislation

Comparative studies have paid much attention to the archetypal form of legislation, statute law. A European research project of the 1980s which covered various domestic systems and European law looked at the legislative process through all its stages, from the first political initiative until the promulgation of the text.[58] Much attention has also been paid to the style of legislative drafting.[59] Early comparative writings highlighted the differences between Continental codes and the traditional English 'piecemeal' approach to legislation. The latter only aims to give a pointillist solution to a specific and narrowly defined problem. As opposed to this, a code is a statute which comprehensively governs the law, or a branch of the law, such as private law or a part of it, abrogating the previous law relative to the same subject-matter. More recent works have been more inclined to downplay the consequences of these differences and dispel some myths that could be found in English and American writings on Continental codes.[60] One of the reasons for this is the change in the character of statute law. The golden age of legislation in general, and of codification in particular, is over. The belief of the eighteenth and nineteenth centuries that legislatures reign supreme has been shattered in view of the increasing constraints imposed by Constitutions and international obligations. Furthermore, the inflationary use of legislation as an instrument of social change has not only led to a certain trivialization and marginalization of this source of law, but also to a continuing deterioration of the quality of codes and other statutes alike. These observations apply to both common law and civil law systems.[61] As Dean Calabresi famously observed, we may be living in an 'age of statutes' and 'statutorification', but at the same time we are 'choking in statutes'.[62]

Custom, Doctrine, and Precedent in French Law', (1958) 18 *Louisiana LR* 235 ff; Gianmaria Ajani, *Le fonti non scritti nel diritto dei paesi socialisti* (1985); Reinhard Zimmermann and Nils Jansen, 'Quieta Movere: Interpretative Change in a Codified System', in *The Law of Obligations: Essays in Celebration of John Fleming* (1998), 285 ff; Stefan Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law', (2005) 64 *Cambridge LJ* 481 ff and 'An Empire of Light? II: Learning and Lawmaking in Germany Today', (2006) 26 *Oxford Journal of Legal Studies* 627 ff; Alexandra Braun, *Giudici e Accademia nell'esperienza inglese: Storia di un dialogo* (2006).

58 Alessandro Pizzorusso (ed), *Law in the Making: A Comparative Survey* (1988).

59 William Dale, *Legislative Drafting: A New Approach. A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom* (1977); Alain Viandier (ed), *Recherche de légistique comparée* (1988). For a historical comparison of the legislative styles in England and in the Germanic legal systems, see Bernd Mertens, *Gesetzgebungskunst im Zeitalter der Kodifikationen: Theorie und Praxis der Gesetzgebungstechnik aus historisch-vergleichender Sicht* (2004).

60 Hein Kötz, 'Taking Civil Codes Less Seriously', (1987) 50 *Modern LR* 1 ff; James Gordley, 'Myths of the Code Civil', (1994) 42 *AJCL* 459 ff.

61 For the influences of these developments on sources of law and legal method in a comparative perspective, see Mary Ann Glendon, 'The Sources of Law in a Changing Legal Order', (1983–4) 17 *Creighton LR* 663 ff and Mauro Cappelletti, *The Judicial Process in a Comparative Perspective* (1989).

62 Guido Calabresi, *A Common Law for the Age of Statutes* (1982), 1.

The application and interpretation of statutes has also given rise to a large body of comparative literature,[63] although only a few attempts at a comprehensive comparison of the methodological approaches of two or more legal systems have been undertaken. A ground-breaking study was published by the so-called '*Bielefelder Kreis*' under the auspices of Neil McCormick and Robert Summers in 1991.[64] On the basis of an elaborate questionnaire, and using a sophisticated methodological approach, the contributors analysed the rules and principles of statutory interpretation in nine legal systems. That study sparked further research. The 1990s saw a number of English-German comparisons of particular methodological problems related to legislation in areas such as tax law, family law, and the law of unfair competition.[65] In 2001, for the first time a comprehensive comparative and historical study of statutory interpretation in four legal systems was published. It covered England, France, and Germany, and thus the major three jurisdictions of the three Western legal families, and it looked at the approach of the European Court of Justice as well.[66] Building on the methodological groundwork of the *Bielefelder Kreis*, and in accordance with the approach advocated at the end of the previous Section of this chapter, this study aimed to overcome the structural particularities of the national theories on legal method by focusing predominantly on court practice. More recent works have focused on the use of specific types of interpretative argument in legal reasoning across jurisdictions, such as recourse to legislative history, comparative materials, and European law in the interpretation of national law.[67] The trend of comparative research on statutory interpretation resembles that on statute law in general. While the early works highlighted the differences between the systems belonging to the common law and those

63 Herbert A. Smith, 'Interpretation in English and Continental Law', (1927) 9 *Journal of Comparative Legislation* 153 ff; Harold C. Gutteridge, 'A Comparative View of the Interpretation of Statute Law', (1933) 8 *Tulane LR* 1 ff; Walter G. Becker, 'Rechtsvergleichende Notizen zur Auslegung', in *Festschrift für Heinrich Lehmann* (1956), 70 ff; Bernard Rudden, 'Courts and Codes in England, France and Soviet Russia', (1973) 48 *Tulane LR* 35 ff; Reinhard Zimmermann, 'Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective', (1997) 56 *Cambridge LJ* 315 ff.

64 D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Statutes: A Comparative Study* (1991).

65 Karsten Nevermann, *Justiz und Steuerumgehung: Ein kritischer Vergleich der Haltung der Dritten Gewalt zu kreativer steuerlicher Gestaltung in Großbritannien und Deutschland* (1994); Harriet Christiane Zitscher, *Elterlicher Status in Richterrecht und Gesetzesrecht: Über Rechtsfindung in Deutschland und England – Rechtsetzung und richterliche Methode seit 1800* (1996); Ansgar Ohly, *Richterrecht und Generalklausel im Recht des unlauteren Wettbewerbs: Ein Methodenvergleich des englischen und des deutschen Rechts* (1997).

66 Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (2 vols, 2001); for summaries in English see the reviews by Hans W. Baade, (2005) 69 *RabelsZ* 156 ff and Horst K. Lücke, (2005) 54 *ICLQ* 1023 ff, as well as Stefan Vogenauer, 'Statutory Interpretation', in Jan Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, 2012), 826 ff. See now also Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (2004), covering France, the United States of America, and the European Union, and Patrick Melin, *Gesetzesauslegung in den USA und in Deutschland* (2005).

67 Michal Bobek, *Comparative Reasoning in European Supreme Courts* (2013); Holger Fleischer (ed), *Mysterium 'Gesetzesmaterialien': Bedeutung und Gestaltung der Gesetzesbegründung in Vergangenheit, Gegenwart und Zukunft* (2013); Martin Brenncke, *Judicial Law-making in English and German Courts* (2018), 257–422.

pertaining to the civil law world, the more recent studies show that, at least for a couple of decades now, there have been more similarities than previously thought.

Types of legislation other than statute law, such as regulations, by-laws, and so on, have been somewhat neglected by comparative lawyers, despite their huge quantitative significance. Even more strikingly, the phenomenon of Constitutions as sources of law was for a long time not treated in depth. This might be explained by the traditional bias of comparative studies towards private law and the fact that, in most legal systems, Constitutions are technically regarded as statutes with a constitutional content.[68] However, over the past decade or so a few important comparative accounts of constitutional interpretation have seen the light of day.[69]

(b) Case Law

Judge-made law is a further preoccupation of comparative lawyers. The difference between the literary, discursive, and closely fact-related judicial style of the Anglo-American courts and the formal, austere, and abstract mode of writing judgments on the Continent has been noted again and again.[70] Even more importantly, the fact that the common law systems acknowledge precedent as a binding source of law was long taken to be the essential difference between the common law and the civil law. It does not come as a surprise therefore that comparative works on the status of case law on both sides of the Channel and/or the Atlantic abound.[71] Today there is widespread agreement that, as with statute law, the perceived

[68] See eg the last sentence of the Constitution of the French Fifth Republic: 'La présente loi sera executée comme Constitution de la République'.

[69] Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006); Vicky C. Jackson and Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (2011), 599 ff. For a brief overview, see Jeffrey Goldsworthy, 'Constitutional Interpretation', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 689 ff. The study of Thierry Di Manno, *Le juge constitutionnel et la technique des décisions 'interprétatives' en France et en Italie* (1997) concerns primarily the interpretation of statutes, and not of the Constitution.

[70] Jan Gillis Wetter, *The Styles of Appellate Judicial Opinions: A Case Study in Comparative Law* (1960); Folke Schmidt, *The 'Ratio Decidendi': A Comparative Study of a French, a German and an American Supreme Court Decision* (1965); Gino Gorla, 'Lo stile delle sentenze: Ricerca storicocomparativa', (1967) 90 *Quaderni del Foro italiano* 313 ff; Hein Kötz, 'Über den Stil höchstrichterlicher Entscheidungen', (1973) 37 *RabelsZ* 254 ff; J. L. Goutal, 'Characteristics of Judicial Style in France, Britain and the USA', (1975) 24 *AJCL* 43 ff; F. H. Lawson, 'Comparative Judicial Style', (1976) 25 *AJCL* 364 ff; Jutta Lashöfer, *Zum Stilwandel in richterlichen Entscheidungen: Über stilistische Veränderungen in englischen, französischen und deutschen Urteilen und in Entscheidungen des Gerichtshofs der Europäischen Gemeinschaften* (1992). See also the contributions in *La sentenza in Europa. Metodo, tecnica e stile. Atti del Convegno internazionale per l'inaugurazione della nuova sede della Facoltà, Ferrara, 10–12 ott. 1985* (1988).

[71] John Chipman Gray, 'Judicial Precedents: A Short Study in Comparative Jurisprudence', (1895) 9 *Harvard LR* 27 ff; Robert L. Henry, 'Jurisprudence Constante and Stare Decisis Contrasted', (1929) 15 *ABA Journal* 11 ff; Arthur L. Goodhart, 'Precedent in English and Continental Law', (1934) 50 *LQR* 40 ff; Francis Deák, 'The Place of the "Case" in the Common and the Civil Law', (1934) 8 *Tulane LR* 337 ff; Charles Szladits, 'A Comparison of Hungarian Customary Law with English Case Law', (1937) 19 *Journal of Com-*

differences are rather due to diverging theories of sources and that there are, at least in this respect, no major differences of practical relevance between the legal families. If evidence had been needed it would again have come from the *Bielefelder Kreis*, which produced another authoritative study, this time on precedent, in 1997.[72]

That book also drew attention to a huge gap in comparative research on precedent: while there was and is a very significant body of literature as to whether judge-made law is or is not a source of law in different systems, almost no comparative analysis of the case law method has taken place. The highly developed case law theory of Anglo-American jurisdictions has no counterpart on the Continent. There, lawyers had been so busy pondering yet again whether precedent is a binding source of law that they overlooked that even a *de facto* source which is habitually followed has to be, and indeed is, applied and interpreted according to certain methodological standards. How this is done in different jurisdictions is certainly a promising field for further comparative enquiry.

(c) Other Sources of Law

Beyond statute law and case law comparatists have rarely ventured. Sure, the question as to whether doctrinal writings of legal scholars constitute a source of law or not is a comparative evergreen. However, the debate is narrowed down to discussions of scholars' 'influence' on the judiciary and to statistical analyses of citation practices of the courts.[73] A thorough comparative study which would take account of the different character of legal learning in different systems and which would venture beyond simple causal models of influence is missing. Custom, its establishment, its proof, and its application never seem to have arrived on the radar screen of comparative lawyers. While this might be legitimate to the extent that customary law is increasingly less important even in many non-Western systems, this cannot be

parative Legislation 165 ff; Antoinette Maurin, *Le role créateur du juge dans les jurisprudences canadienne et française comparées* (1938); Imre Zajtay, 'Begriff, System und Präjudiz in den kontinentalen Rechten und im Common Law', (1965) 165 *Archiv für die civilistische Praxis* 97 ff; Mauro Cappelletti, 'The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference – or no Difference at all?', in *Festschrift für Konrad Zweigert* (1981), 382 ff; Thomas Probst, *Die Änderung der Rechtsprechung: Eine rechtsvergleichende, methodologische Untersuchung zum Phänomen der höchstrichterlichen Rechtsprechungsänderung in der Schweiz (civil law) und den Vereinigten Staaten (common law)* (1993) and, taking into account German, Italian, and US-American law, Frank Diedrich, *Präjudizien im Zivilrecht* (2004). For mixed legal systems, see Palmer (n 48), 44 ff and Ryan McGonigle, 'The Role of Precedents in Mixed Jurisdictions: A Comparative Analysis of Louisiana and the Philippines', (2002) 6.2 *Electronic Journal of Comparative Law* <https://www.ejcl.org/62/abs62–1.html>. For rare analyses of different approaches in civilian jurisdictions, see C.-N. Fragistas, 'Les précédents judiciaires en Europe continentale', in *Mélanges offerts à Jacques Maury* (vol II, 1960), 139 ff; Uwe Blaurock (ed), *Die Bedeutung von Präjudizien im deutschen und französischen Recht* (1985). As to the different approaches in common law jurisdictions, see Arthur L. Goodhart, 'Case Law in England and America', (1930) 15 *Cornell Law Quarterly* 173 ff.

[72] D. Neil MacCormick and Robert S. Summers (eds), *Interpreting Precedents: A Comparative Study* (1997), examining eleven legal systems.

[73] Hein Kötz, 'Die Zitierpraxis der Gerichte: Eine vergleichende Skizze', (1988) 52 *RabelsZ* 644 ff; Neil Duxbury, *Judges and Jurists: Essays on Influence* (2001), with chapters on English, French, and American law.

said with respect to the abundance of trade usages that play a major role in domestic and international commerce. Similarly, there is no comparative discussion of the question whether contracts are sources of law. Finally, there is very little effort to compare the various forms of 'higher law' that continue to be acknowledged in many contemporary systems, particularly in the religious ones, with other phenomena that seem to be equally grounded in supra-legislative norms, such as the *principes généraux* of French administrative law[74] or the 'law' that, according to Article 20(3) of the German Basic Law, is supposed to exist beyond legislation.

V. Where to Go Next?

Sources of law and legal method will remain perennial themes for comparative law. As has been seen in the preceding section of this chapter, these issues have probably been explored more thoroughly than most other comparative topics. Still, it should have become obvious that there is more to be done.

First, the attention of comparative lawyers has so far been directed mostly at statutes and case law, and at the methodological issues surrounding them. Other sources – both in the narrower sense and in the wider sense used for the purposes of this chapter – have been neglected.

Second, the focus has been on a comparison between the common law and the civil law and of the leading exponents of these legal families, that is, English, French, and German law. There is a conspicuous absence of genuinely comparative studies taking into account, say, Canadian, South African, or Spanish law, not to speak of the non-Western legal traditions.[75] The reasons for this are fairly obvious: the much-maligned Eurocentrism of the discipline of comparative law, practical issues like linguistic skills and accessibility of materials, and the disproportionately bigger challenge presented by an attempt to compare a Western system's sources and methods to those of a non-Western jurisdiction.

Third, the legal systems hitherto compared have mostly been those of traditional nation states. There are only a few studies comparing the sources and methods of these jurisdictions with those of supra-national legal systems which pose new questions and problems. One of these problems is that much of their law is deliberately not binding. Such 'soft law', which is also increasingly found in domestic laws, cannot easily be reconciled with many of the prevailing conceptions on sources of law. The reactions of different systems to this phenomenon would certainly merit closer comparative study.

Fourth, and maybe most importantly for the comparative agenda in the near future, the sources and methods of many of the supra-national systems are still evolving and being

[74] But see Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* (1955); Philippe Jestaz, *Les sources du droit* (2nd edn, 2015), 11 ff.

[75] But see Benjamin Herzog, *Anwendung und Auslegung von Recht in Portugal und Brasilien* (2014); Yuanshi Bu, *Juristische Methodenlehre in China und Ostasien* (2016).

shaped. They are therefore not only waiting to become the object of comparative enquiries, but are in dire need of preparatory studies by comparative lawyers which provide arguments for or against the acceptance of particular sources or the adoption of particular methodological approaches, and building blocks for a theory of sources and methods that suit their needs.[76]

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[76] See eg the suggestions by Jan Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (1977), 258 ff; Frank Diedrich, *Autonome Auslegung von Internationalem Einheitsrecht* (1994); Urs Gruber, *Methoden des Internationalen Einheitsrechts* (2004); Stefan Vogenauer, 'Eine gemeineuropäische Methodenlehre – Plädoyer und Programm', (2005) *Zeitschrift für Europäisches Privatrecht* 234 ff; Günter Hager, *Rechtsmethoden in Europa* (2009). For first attempts at a comprehensive European method, see Sebastian A. E. Martens, *Methodenlehre des Unionsrechts* (2013); Karl Riesenhuber (ed), *European Legal Methodology* (2017).